



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 30, 1995

Mr. Jonathan Graham
City Attorney
City of Temple
Municipal Building
Temple, Texas 76501

OR95-164

Dear Mr. Graham:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. The City of Temple (the "city") received a request from a company for "copies of all other bids and all internal and external correspondence relative to RFP [Request for Proposals] Number 55-01-94." Your request was assigned ID# 27801.

The requestor was one of six offerers that submitted proposals to privatize the city's wastewater treatment plant in response to RFP No. 55-01-94. The city contends that all of the requested documents that have not been furnished to the requestor are excepted from required public disclosure pursuant to sections 552.104, 552.107, 553.110, and 552.111 of the Act.¹ You have submitted copies or representative samples of the requested documents and have given an explanation of the reasons each document or category of documents is excepted from disclosure.²

¹You also cite section 552.112 of the Government Code, which applies to "information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both," Gov't Code § 552.112(a), but you do not discuss this section or state that it applies to any of the records you have submitted. We therefore will not discuss it in connection with the records you have submitted.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499, 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested

The first document is a memorandum written by an attorney in private practice to the city attorney in response to a memo from the city attorney. The memo consists of legal advice to the city relating to the terms of RFP No. 55-01-94. You claim that it is excepted from disclosure by section 552.107 of the Government Code, which applies to "information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas." Gov't Code § 552.107(1). Section 552.107 applies to communications from an attorney providing legal advice to a governmental body. Open Records Decision Nos. 380 (1983); 200 (1978); see Open Records Decision No. 462 (1987) at 13. We agree that the contents of this memorandum are excepted from public disclosure by section 552.107 of the Government Code.

You next claim that the six offerers' proposals submitted in response to RFP No. 55-01-94 are excepted from disclosure by sections 552.104 and 552.110 of the Government Code. Section 552.104 protects "information that, if released, would give advantage to a competitor or bidder."³ The city was still evaluating the proposals when the request was received but since then has awarded the contract to one of the offerers.

Section 552.104 protects interests of a governmental body that relate to competition for a contract or benefit, such as interests related to a competitive bidding situation. Open Records Decision No. 592 (1991) at 8. It does not ordinarily apply after the contract has been awarded. Open Records Decision No. 541 (1990) at 5. Since the contract has been awarded, and the city has not claimed any interest that would continue after award of the contract, we conclude that section 552.104 may no longer be claimed to protect the proposals or any of the other documents from disclosure pursuant to the Open Records Act.

You state that some of the offerers asserted in their proposals that portions of the proposals are confidential in nature, and have asked the city to withhold that information. You believe that they are asserting that portions of their proposals are excepted from disclosure under section 552.110 of the Government Code, which protects "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." You have written to these offerers, advising them of their opportunity pursuant to section 552.305 of the Government Code to write to this office stating the reasons why their proposals should be excepted from public

(Footnote continued)

records to the extent that those records contain substantially different types of information than that submitted to this office.

³One of the proposals was the city's own staff, and you assert that the city is a "competitor for purposes of the exception afforded by section 552.104." We need not address this contention, in view of our conclusion about the applicability of section 552.104.

disclosure. Two offerers, ECO Resources, Inc., and Operations Management International, Inc. ("OMI") have each sent us a letter claiming that section 552.110 protects information in their proposals.

Section 552.110, in referring to "commercial or financial information obtained from a person" that is privileged or confidential "by statute or judicial decision," has been held to be redundant with section 552.101. Open Records Decision No. 592 (1991). We are not aware of any statute or judicial decision applicable to "commercial or financial information" that applies to the two proposals.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958); see also Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management. [Emphasis added.]

RESTATEMENT OF TORTS § 757 cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.⁴

⁴The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the

The letter of the city notes that some of the offerers appear to raise interests protected by section 552.110, but it does not take a position with respect to whether the proposals should be excepted from disclosure as trade secrets. Accordingly, it is the responsibility of the private company to make a prima facie case that its records are within section 552.110 of the Open Records Act. Four offerers did not write to the office to explain why their proposals should be excepted from disclosure under section 552.110. The proposals of these four offerers, including the proposal prepared by the city staff, are therefore not excepted from disclosure by section 552.110 of the Open Records Act.

The letter from ECO Resources, Inc., asserts that five sections of its proposal are exempt from disclosure "under one or more of the exceptions found in . . . [the Open Records Act] as related to competitive pricing, operating plans, trade secrets, commercial information and other confidential information." This letter does not establish a prima facie case for exception under section 552.110 of the Government Code, nor does it establish that any part of the proposal is excepted under any other exception of the Open Records Act. Accordingly, the proposal submitted by ECO is not excepted from disclosure by section 552.110 of the Government Code.

The letter from OMI contends that its proposal is excepted under section 552.110, "which protects trade secrets, commercial information, and financial information because our proposal contains information about our competitive pricing and our proposed plan of operation." The letter further states that a "proprietary notice" on the back of the title page explicitly requested confidentiality and that OMI expended a tremendous amount of effort, cost, and good faith in developing its proposal. These assertions do not establish a prima facie case for exception under section 552.110 of the Government Code. Accordingly, the proposal submitted by OMI is not excepted from disclosure by section 552.110 of the Government Code.

Items three and four consist of memoranda from the city attorney to members of the staff committee appointed to evaluate proposals and make recommendations to the city manager and city council. You claim that section 552.111 of the Government Code excepts portions of the memoranda from disclosure. You have marked the portions that you believe are confidential.

(Footnote continued)

company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, *supra*; see also Open Records Decision Nos. 319 (1982) at 2; 306 (1982) at 2; 255 (1980) at 2.

Section 552.111 of the Government Code permits you to withhold “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This exception protects internal agency communications consisting of advice, recommendations, opinions and other material reflecting the deliberative or policymaking processes of the governmental body. Open Records Decision No. 615 (1993). An agency’s policymaking functions, however, do not encompass internal administrative or personnel matters. *Id.* at 5-6. Nor is purely factual information excepted from disclosure by section 552.111. *Id.*

The city’s choice of a private company to operate the wastewater treatment plant is not merely an internal administrative or personnel matter but an exercise of its authority to provide public services to its residents. It thus involves the city’s policymaking functions for purposes of section 552.111.

We have examined the third and fourth documents, and have determined that most of the information you have marked is excepted from disclosure by section 552.111 of the Government Code. You have marked some factual information, which may not be withheld under section 552.111, and we have indicated that these portions are not excepted by section 552.111.

The fifth document is a representative copy of the evaluation forms completed by members of the evaluation committee. You assert that this form, when filled in by a staff member, contains opinions, advice, and recommendation from staff and is thus excepted from disclosure under section 552.111. We agree that the “Evaluation Matrix” portion of the evaluation form, when filled in by a staff member, would be excepted from disclosure under section 552.111. However, the remaining portions of the evaluation forms, the “Required elements of proposal” and the “Minimum qualifications,” are factual and may not be withheld under section 552.111.

The sixth document consists of lists of questions apparently prepared by a consultant for the city and proposed for use in interviewing offerers. Some of the questions implicitly evaluate the proposal that they address. The questions also incorporate the opinions of consultants and staff members about significant issues to be resolved in the contracting process. Except for the consulting engineers’ facsimile cover page, the questions in the sixth document are excepted from disclosure by section 552.111.

The seventh document consists of a standard set of questions used by the evaluation committee for interviewing each company on the short list. You believe that this document contains opinions, advice, and recommendation and is thus excepted under section 552.111. You argue that the form and content of the questions identify the issues

that committee members believed were important in evaluating the proposals. We have reviewed the questions, and agree that they are excepted from disclosure by section 552.111, as expressing opinion, advice, and recommendation.

In summary, the offerers' proposals are available to the requestor. The other seven documents that you have submitted are in part confidential and in part open to the requestor, as indicated by the above discussion and by our markings on the records.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Margaret A. Roll". The signature is fluid and cursive, with the first name "Margaret" being more prominent than the last name "Roll".

Margaret A. Roll
Assistant Attorney General
Open Government Section

MAR/SLG/LRD/rho

Ref.: ID# 27801

Enclosures: Marked documents

cc: Mr. W. A. Callegari
President
ST Environmental Services
Two Chasewood Park
20405 St. Hwy. 249, Suite 600
Houston, Texas 77070
(w/o enclosures)

Mr. David E. Whitaker
Vice President, Finance
ECO Resources, Inc.
12550 Emily Court
Sugar Land, Texas 77478
(w/o enclosures)

Mr. Jack R. Noble
Vice President, Project Development
Operations Management International, Inc.
5299 DTC Boulevard, Suite 1200
Englewood, Colorado 80111-3333
(w/o enclosures)